Supreme Court, U.S.
FILED

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No. ———

In the Supreme Court of the United States

ANGEL D. GARCIA,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether it is constitutionally reasonable for police officers, who secure a residence from the outside under this Court's authority in *Segura v. United States*, 468 U.S. 796 (1984) and *Illinois* v. *McArthur*, 531 U.S. ___, 121 S. Ct. 946 (2001), to enter the home to seize evidence inside the home without a warrant or an existing exception to the warrant requirement?

LIST OF PARTIES TO THE PROCEEDING

Parties Below:

Petitioner is Angel D. Garcia, presently incarcerated. Respondent is the People of the State of Illinois.

Parties Before This Court:

The parties before this Court are the same parties as below. The Petitioner before this Court is the Appellant below. The Petitioner has no corporate affiliations. The Respondent before this Court is the Appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PRAYER FOR RELIEF 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ILLINOIS APPELLATE COURT IMPROPERLY EXPANDS *SEGURA* TO ALLOW POLICE WHO SECURE A HOME TO NOW ENTER IT WITHOUT SEEKING OR OBTAINING A WARRANT . . . 4

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ILLINOIS APPELLATE COURT ORDER CONTRADICTS THIS COURT'S PREVIOUS FOURTH AMENDMENT DECISIONS 6

A. The Illinois Appellate Court Order Eliminates The Warrant Requirement Inherent In Fourth Amendment Case Law 7

B. The Illinois Appellate Court Order Improperly Diminishes The Established Fourth Amendment Expectation Of Privacy In The Home 9

C. The Illinois Appellate Court Order Improperly Creates New And Expands Old Exceptions To The Fourth Amendment Warrant Requirements 10

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE QUESTION PRESENTED, AND THE POLICE CONDUCT THAT GIVES RISE TO IT, IS LIKELY TO BE REPEATED UNTIL THIS COURT RULES ON THE ISSUE 12

CONCLUSION 13

APPENDIX

A. Appellate Court of Illinois Order, 6/26/00 . . . . . 1a

B. Appellate Court of Illinois Order Denying Motion to Reconsider, 10/30/00 . . . . . 14a

C. Illinois Supreme Court Order Denying Petition for Leave to Appeal, 1/29/01 . . . . . 16a

TABLE OF AUTHORITIES

Cases **Page(s)**

Chimel v. California,
395 U.S. 752 (1969) 9

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 8, 11

Flippo v. West Virginia,
528 U.S. 11 (1999) 9

Illinois v. McArthur,
531 U.S. ___, 121 S. Ct. 946
(Feb. 20, 2001) . . . . . *passim*

Jones v. United States,
357 U.S. 493 (1958) 8

Mincey v. Arizona,
437 U.S. 385 (1978) 9

Payton v. New York,
445 U.S. 573 (1980) 8

People v. Garcia,
No. 1-98-4322
(Ill. App. Ct., June 26, 2000) . . . . . *passim*

People v. Garcia,
No. 90540, 2001 Ill. LEXIS 88
(Ill. Jan. 29, 2001) 1

Segura v. United States,
468 U.S. 796 (1984) . . . . . *passim*

United States v. Chadwick,
433 U.S. 1 (1977) 10

United States v. Van Leeuwen,
397 U.S. 249 (1970) 7

Vale v. Louisiana,
399 U.S. 30 (1970) 9

Constitutional Provisions

U.S. Const., Amend. IV . . . . . *passim*

PRAYER FOR RELIEF

Petitioner, Angel Garcia, respectfully asks this Honorable Court to issue a writ of certiorari to the Appellate Court of Illinois, First District, to review that court's judgment and order entered June 26, 2000.

OPINIONS BELOW

The Appellate Court of Illinois, First District's unpublished order, No. 1-98-4322 (Ill. App. Ct., June 26, 2000) is reproduced in App. A at 1a-13a. The Illinois appellate court's denial of the Petition for Rehearing, No. 1-98-4322 (October 30, 2000) is reproduced in App. A at 14a-15a. The Illinois Supreme Court's denial of the Petition for Leave to Appeal, No. 90540, 2001 Ill. LEXIS 88 (Ill. Jan. 29, 2001) is reproduced in App. A at 16a.

JURISDICTION

The Illinois Supreme Court denied the Petition for Leave to Appeal on January 29, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), since, in the proceedings in the state courts of Illinois, he asserted a violation of his rights under the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. Warrantless Reentry

a. An initial exigent search

On June 30, 1996, at 11:00 a.m., Chicago Police Officers Kischner and Valezquez arrived at an apartment building in Chicago, Illinois to investigate a possible burglary in progress on the third floor. A man in apartment 3A reported what he thought was a burglary in apartment 3B across the hall, the only other apartment on his floor. Kischner unlocked the door to apartment 3B by reaching his hand through a hole in the door. The officers then entered the apartment and looked around briefly for offenders or victims, but no one was present. App. A at 2a. [1]

The officers saw containers of suspected cocaine and marijuana on the living room floor. Kischner pushed the pieces of the door back into place and the police left. App. A at 2a.

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[1]Citations to the lower courts' orders are designated "App. __ at __." Citations to the Common Law Record are designated "CL." Citations to the Transcript of Proceeding are designated by the alphabetical order of the individual hearing transcript ("A, B, C") and the page number of that transcript, for example "E. 11" or "R. 128."

b. Securing of the premises and a subsequent arrest

The apartment was then "secured." Kischner directed several other officers to set up surveillance at the building. App. A at 2a. Surveillance continued until Petitioner's arrest around 3:00-4:00 p.m., between four and five hours later. App. A at 3a. During that time, police did not obtain or even seek a warrant, although several officers were available and all were in radio contact with each other. E. 11; R. 128, 138; App. A at 3a.

The officers arrested Petitioner while he was turning the key that he placed in the lock to his apartment door. App. A at 3a. At the suppression hearing and at trial, Officer Kischner testified that he arrested Petitioner when he "heard the lock turn." E. 24; R. 129; CL. 90. Petitioner had **not** opened the apartment door. E. 21-24; R. 130.

c. A second warrantless entry and a warrantless search and seizure

After taking Petitioner into custody *outside* his apartment, Officer Kischner then reentered the apartment. App. A at 3a. At no time between their first entry and this second entry to Petitioner's apartment did the Chicago police obtain consent or a search warrant. E. 8-9, 26. After reentering the apartment, the officer seized the suspect contraband. He also recovered a lease and a utility bill in Petitioner's name. App. A at 3a.

2. Trial and Appellate Court Rulings

The trial court denied Petitioner's Motion to Suppress, finding that the requirement of a warrant was "overly

technical" and that the police properly "went back in and picked up the narcotics they could have seized when they first entered the premises." O. 17-19. The appellate court interpreted the trial court as holding "that the officers did not need a warrant to return for the minimal purposes of removing the contraband they had earlier observed." App. A at 3a. The appellate court upheld the reentry and affirmed the conviction, but on a different ground.

The Illinois appellate court, relying on Part IV of *Segura v. United States*, 468 U.S. 796, 805-13 (1984) (Burger, C.J. and O'Connor, J.) held that the Chicago police seized the entire premises, after finding the contraband, and were thus justified in reentering Petitioner's apartment, after his arrest, without a warrant. App. A at 5a-6a. As part of its judgment, the court granted the State's request and assessed Petitioner $100.00 as costs for the appeal. App. A at 13a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ILLINOIS APPELLATE COURT IMPROPERLY EXPANDS *SEGURA* TO ALLOW POLICE WHO SECURE A HOME TO NOW ENTER IT WITHOUT SEEKING OR OBTAINING A WARRANT

The Illinois appellate court's order in this case misconstrues and unjustifiably expands this Court's holding in *Segura v. United States*, 468 U.S. 796 (1984). In fact, the Illinois appellate court's order goes well beyond this Court's most recent decision in *Illinois v. McArthur*, 531 U.S. ___, 121 S. Ct. 946 (2001), holding that the police may now do away with the warrant requirement altogether. The Illinois appellate court expands the police's temporary constitutional

permission for an exigent search and securing of the premises while they seek a warrant into a justification for a *warrantless reentry* into the home, *after any exigency had passed,* to seize the suspect contraband. The Illinois appellate court thereby transforms the constitutional inch into an unconstitutional mile.

Based on *Segura* and other decisions, this Court recently held in *McArthur* that police may secure a residence from the outside, for a reasonable period of time *while a warrant is being sought and obtained.* 121 S. Ct. at 948. Both *Segura* and *McArthur* emphasize the different, and lesser, interests implicated by securing the premises while a warrant is sought and obtained. *McArthur* emphasized the fact that no search took place and no evidence was obtained until after police obtained a warrant, as well as that the seizure of the premises was considerably less intrusive than a warrantless entry into the home. 121 S. Ct. at 950-51, 953. The *Segura* majority upheld the admission of evidence seized before police obtained a warrant only because the warrant was based on completely independent grounds; the *Segura* Court, however, unanimously reaffirmed that warrantless entries without exigent circumstances are unconstitutional. 468 U.S. at 798, 810, 813-14, and 820.[2]

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[2]468 U.S. at 813-14 (BURGER, C.J., Part V, joined by WHITE, J., POWELL, J., REHNQUIST, J., and O'CONNOR, J.) (finding evidence admissible under the independent source doctrine); 468 U. S. at 798 (BURGER, C.J., Part I, joined by WHITE, J., POWELL, J., REHNQUIST, J., and O'CONNOR, J.); 468 U.S. at 810 (BURGER, C.J., Part IV, joined only by O'CONNOR, J.); and 468 U.S. at 820 (STEVENS, J., dissenting, joined by BRENNAN, J., MARSHALL, J., and BLACKMUN, J.) (reaffirming the illegality of warrantless entry and search).

The Illinois appellate court pays no respect to the greater privacy interests implicated in a search and warrantless entry into a person's home. Instead, to support the Chicago police's illegal entry into Petitioner's home after his arrest, the appellate court goes where no American Court has gone before. The Illinois appellate court allows an initial lawful entry under exigent circumstances to justify a second, warrantless, entry -- well after any exigency has passed, well after police have secured the premises assuring the status quo and well after any need to forego a warrant has been eliminated. This holding, if allowed to stand, is a watershed in Fourth Amendment jurisprudence.

This Court should grant certiorari and review the order of the Illinois appellate court.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ILLINOIS APPELLATE COURT ORDER CONTRADICTS THIS COURT'S PREVIOUS FOURTH AMENDMENT DECISIONS

This Court, in *McArthur*, drew the line at the warrantless entry to the home. While *McArthur* condoned securing the home for a limited period of time, to maintain the status quo while police obtain a warrant, no warrantless entry took place. 121 S. Ct. at 949. In contrast, the Illinois appellate court crosses that line, allowing police to ignore the warrant requirement completely. In *Garcia*, the police secured the home from the outside and then reentered without *any* attempt to seek or obtain a warrant. The order affirming the subsequent warrantless entry to seize the evidence is unprecedented. This Court should grant certiorari to address this important issue.

A. The Illinois Appellate Court Order Eliminates The Warrant Requirement Inherent In Fourth Amendment Case Law

This Court has allowed temporary seizures where needed to preserve evidence while police diligently sought and obtained a warrant. *See McArthur,* 121 S. Ct. at 952; *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970) (reasonable suspicion justifies detaining package delivered for mailing while warrant is sought). In contrast, the police in this case dispensed with the warrant requirement, consciously opting not to seek a warrant but rather to reenter without a warrant to seize the contraband and personal papers. The police arrested Petitioner outside the closed door of his apartment. E. 24-26; R. 116. The police then reentered his apartment without a warrant and without the consent or exigent circumstances necessary to allow a warrantless entry. E. 8-9, 25-26; R. 116. The Illinois appellate court's order therefore conflicts with this Court's authority.

The Illinois appellate court's reliance on Part IV of the *Segura* opinion (App. A at 5a-6a) is flawed. The *Segura* Court unanimously reaffirmed that warrantless entries are illegal. 468 U.S. at 798, 810, and 820.[3] The *McArthur* Court upheld the temporary seizure of defendant's trailer home, *for one to two hours while police obtained a warrant*, as considerably less intrusive than warrantless entry into the home. 121 S. Ct. at 953. Unlike the police in *Segura* or

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[3]468 U. S. at 798 (BURGER, C.J., Part I, joined by WHITE, J., POWELL, J., REHNQUIST, J., and O'CONNOR, J.); 468 U.S. at 810 (BURGER, C.J., Part IV, joined only by O'CONNOR, J.); and 468 U.S. at 820 (STEVENS, J., dissenting, joined by BRENNAN, J., MARSHALL, J., and BLACKMUN, J.).

even *McArthur*, the Chicago police in this case made no attempt to obtain or even seek a warrant. Therefore, neither *Segura,* nor *McArthur,* supports the police's warrantless reentry in this case.

This Court has long honored the basic rule that the police may not enter and make a warrantless seizure. The "chief evil" against which the fourth amendment was intended to protect the people was the "physical entry of the home." *Payton v. New York*, 445 U.S. 573, 585 (1980). Therefore, any entry of a home without a warrant is presumptively unreasonable. *Payton*, 445 U.S. at 586. The *Payton* Court recognized "the long-settled premise is that, absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Payton*, 445 U.S. at 587-88. If an officer merely needed probable cause in order to enter a suspect's home, "the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Jones v. United States*, 357 U.S. 493, 498 (1958).

Because a warrantless entry is presumed to be unreasonable, the Government has the burden of proving that the warrantless entry was conducted pursuant to an exception. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The Illinois appellate court does not enforce this requirement. In *Garcia*, the police could have seized the contraband during the initial, lawful, exigent search. But the police instead consciously decided to leave the contraband in the home, eliminated any potential exigency by securing the premises, and then willfully ignored the warrant requirement by reentering the home to seize the contraband. This concept, in which the police do not even think about seeking a warrant,

is a dangerous intrusion on the rights of all citizens. To maintain meaning in the Fourth Amendment, this Court must grant the petition and reverse the Illinois appellate court's ruling.

B. The Illinois Appellate Court Order Improperly Diminishes The Established Fourth Amendment Expectation Of Privacy In The Home

This Court has acknowledged the sanctity of a person's home in a long line of landmark cases from *Chimel v. California*, 395 U.S. 752 (1969), *Vale v. Louisiana*, 399 U.S. 30 (1970), and *Mincey v. Arizona*, 437 U.S. 385 (1978) (holding that warrantless search of defendant's home, a murder scene, violated defendant's Fourth Amendment rights), to the more recent *Flippo v. West Virginia*, 528 U.S. 11 (1999) (unanimous decision reaffirming *Mincey v. Arizona*). The Illinois appellate court order contradicts all of these precedents.

In *Mincey*, this Court found the police minimized the possibility of loss of evidence by posting police to guard the door. This reinforced the warrant requirement for entry to the home. 437 U.S. at 393-94. In *Flippo*, this Court's *per curiam* opinion reaffirmed *Mincey* and held that a warrantless reentry into a cabin rented by the defendant, where the police had already removed him from the premises, was unconstitutional. 528 U.S. at 11-12. Similarly, the police violated Petitioner's privacy interest in his home when they reentered his apartment and, thus, improperly conducted a "search" as well as a "seizure" under the Fourth Amendment.

This Court must therefore grant the petition, review and reverse or, in the alternative, issue a summary disposition on the merits based on this Court's prior precedent.

C. The Illinois Appellate Court Order Improperly Creates New And Expands Old Exceptions To The Fourth Amendment Warrant Requirement

In an effort to support its order effecting a sea change in Fourth Amendment jurisprudence, the Illinois appellate court creates new and expands old exceptions to established Fourth Amendment law.

First, The Illinois appellate court's basis for ignoring the warrant requirement, that the police did not know when Defendant would arrive (App. A at 6a), does not justify the failure to even seek a warrant. Obtaining a warrant would require (at least) a phone call or (at most) the involvement of only one officer at the scene, and would not have affected the police surveillance and/or securing of the premises. The Illinois appellate court overlooks the fact that the police in *Garcia*, having secured the premises, and later having arrested Petitioner, had no excuse for *not* seeking a warrant. This Court has already held that police must get a warrant before conducting a search where, as in Petitioner's case, police have already detained the suspect and secured the item to be searched and there is no danger to police or risk of losing the evidence. *See, e.g., United States v. Chadwick*, 433 U.S. 1, 15 (1977) (holding that warrant required to search footlocker seized after defendant's arrest).

The appellate court's concern that the police did not know when a suspect would return (App. A at 6a) is irrelevant to the issue of whether the police needed a warrant

to reenter. The police had the premises secured at all times from their initial departure through their subsequent warrantless reentry. With precautions already taken to preserve the status quo, and an immediate arrest accomplished before Petitioner entered the home, police had already eliminated any excuse to go back in without a warrant. Lacking both consent and any exigent circumstances, the warrantless reentry was constitutionally inexcusable.

Second, the Illinois appellate court's argument that police did not reenter the apartment to search it, but rather only to retrieve evidence they already knew was present (App. A at 6a) is also contrary to established precedent. This Court in *Coolidge* held that plain view alone is never enough to justify warrantless seizure. 403 U.S. at 468. The *Coolidge* court emphasized that where (as in Petitioner's case) the police knew the location of the evidence and intend to seize it, there is no legal inconvenience in obtaining a warrant. 403 U.S. at 470-71. These principles all apply here.

Plainly put, exigent circumstances are a temporary pass, not a permanent license, to enter. The lower court's application of the novel theory that the lawful first entry constituted a timeless invitation to reenter, without a warrant, creates an unconstitutional revolving door to a person's home. This Court should grant the petition to address this compelling issue.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE QUESTION PRESENTED, AND THE POLICE CONDUCT THAT GIVES RISE TO IT, IS LIKELY TO BE REPEATED UNTIL THIS COURT RULES ON THE ISSUE

This Court has determined that securing a home from the outside is constitutionally permissible while police await a warrant based on probable cause. *McArthur,* 121 S. Ct. at 953. This procedure is being utilized and is likely to be utilized more frequently in the future.

With such increased use is also the danger of increased abuse. Unfortunately, the Chicago police have already moved beyond *McArthur's* permissible conduct to another level. The Chicago police are now dispensing with the warrant requirement altogether by expanding the concept of temporary seizure to allow warrantless entry, where the police have decided they have probable cause. The types of unconstitutional intrusions in this case are going to continue unless this Court clarifies and again draws the line in the proverbial sand, limiting the circumstances in which warrantless entries may be conducted and the scope of such intrusions on the privacy rights guaranteed by the Fourth Amendment to the Constitution of the United States.

If this Court declines to review this case, the denial of *Certiorari* will improperly, but certainly, be viewed as a free pass to pursue the conduct at issue in this case. The Chicago police are already doing it. The State of Illinois is already claiming it is constitutionally permissible. And the Illinois appellate court is approving it, as well as assessing fees against those, like Petitioner, who challenge it. App. A at 13a. This significant expansion of *Segura* and *McArthur* must be reviewed.

CONCLUSION

For the aforementioned reasons, Petitioner, Angel Garcia, respectfully requests that this Honorable Court grant *Certiorari*, reverse the order of the Appellate Court of Illinois, First District, and remand for further proceedings. In the alternative, Petitioner respectfully requests that this Court enter a summary disposition on the merits directing the Appellate Court of Illinois to vacate the conviction and enter judgment for the Petitioner.

Respectfully submitted,

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APPENDIX A

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIRST DIVISION

[Filed June 26, 2000]

No. 1-98-4322

THE PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee*,	)
v.	)
ANGEL GARCIA, *Defendant-Appellant*.	)

Appeal from the Circuit Court of Cook County.

No. 96 CR 19120

Honorable Clayton Jay Crane, Judge Presiding.

ORDER

Following a bench trial, defendant Angel Garcia was found guilty of possessing more than 900 grams of a

controlled substance (cannabis) and sentenced to 10 years in prison. On appeal, he contends that the police improperly seized the evidence from his apartment and that the trial court improperly denied his challenge to the chain of custody evidence because of differing testimony regarding the weight of the contraband and the fact one expert testified in violation of Illinois Supreme Court Rule 412. 134 Ill. 2d R. 412.

Prior to trial, a hearing was held on defendant's motion to quash his arrest and suppress the evidence. Veteran Chicago police officer Bruce Kischner (misspelled Kirshner in transcripts of pretrial hearings) testified at both the pretrial hearing and at trial. At 11:30 a.m. on June 30, 1996, he and Officer Velazquez responded to a call of a burglary in progress in apartment 3B at a six-flat apartment building at 2957 North Talman Avenue in Chicago. The officers arrived within minutes of the call, and Officer Kischner ran to the third floor. There he encountered the tenant of apartment 3A, Mr. Jones, standing in the doorway holding a telephone. Jones said he had heard noise in apartment 3B and had called the police after he observed someone breaking into that apartment, the only other apartment on that floor. Officer Kischner made a warrantless entry into apartment 3B by reaching through a hole which had been punched through the door. He looked around the apartment briefly for offenders or possible victims, but no one was present. Near the door on the floor of the living room were two clear plastic "Tupperware" containers, without covers. The containers contained 32 large plastic bags of marijuana and three bags of cocaine wrapped as "kilos" in plastic and brown tape. Kischner replaced the piece of wood that had been punched out of the door, and he and his partner left after securing the apartment.

Officer Kischner directed several other officers to set up surveillance of the building while he spoke to the building's owner who told him that defendant rented apartment 3B. She described defendant as a short, thin, bearded Hispanic man. Officer Velazquez waited on the third-floor landing.

Between 3 and 4 p.m. on that date, Officer Kischner received a radio broadcast that defendant had entered the building. He then observed defendant climbing the stairs. Defendant was stopped and arrested after he turned the lock in the door to apartment 3B. Defendant's driver's license and apartment keys were taken. The officer then reentered apartment 3B and removed the contraband. He also recovered a lease and a utility bill in defendant's name but no currency or weapons. No one had entered the apartment during that period.

The trial court held that exigent circumstances existed to permit the officers to enter the apartment after which they saw the contraband in plain view. The court said that the officers did not need a warrant to return for the minimal purpose of removing the contraband they had earlier observed. The court also denied defendant's two motions to reconsider. In ruling on the latter motion, the court stated that the police had probable cause to arrest defendant when he arrived at his apartment.

The parties stipulated that the telephone and electric service records established that defendant was the customer of record for apartment 3B on June 30, 1996.

Defendant testified at trial that he rented apartment 3B in the spring of 1995 and moved out in early May 1996 when Jose Rodriguez came to live in the apartment. Defendant testified that he told the building owner that Rodriguez was going to assume the lease and put the utilities in his name. He went to the apartment on June 30, 1996, to pick up the rent from Rodriguez who was supposed to pay one-half. He was also going to remove the bed, the television set, and the chest. He denied having been in the apartment for over two weeks before his arrest, and denied that there were any drugs in the apartment.

On cross-examination, defendant admitted that he had left some of his job uniforms in the apartment and stated that he had moved out "a few days" before his arrest. He admitted that he never told the owner that he was going to move out of the apartment, that he did not ring a buzzer downstairs to gain entry on the day of his arrest and that he retained his own set of keys for the apartment.

Defendant first contends that his Fourth Amendment rights were violated when, without a warrant, the police searched his apartment a second time, seizing the contraband they had earlier observed in plain view on their initial search under exigent circumstances. We review the search and seizure of the contraband from defendant's apartment de novo since the facts are uncontroverted and the credibility of the witnesses is uncontested. People v. Krueger, 175 Ill. 2d 60, 64 (1996); People v. McArthur, 304 Ill. App. 3d 395, 397 (1999) .

There are certain exceptions to the Fourth Amendment requirement of a warrant before police may enter a residence.

People v. Foskey, 136 Ill. 2d 66, 74 (1990). Defendant does not challenge the police officers' initial entry into his apartment based on exigent circumstances in response to a call regarding a burglary in progress. Nor does defendant address a police officer's right to seize incriminating evidence without a warrant if he plainly views it from a place from which he has a lawful right to be and the object's incriminating character is immediately apparent. Horton v. California, 496 U.S. 128, 136-37, 110 L. Ed. 2d 112, 122-23, 110 S. Ct. 2301, 2308 (1990). Here, Officer Kischner observed contraband in defendant's apartment when he and his partner lawfully entered looking for burglars or victims. The police secured the apartment and placed it under surveillance until defendant arrived. The issue is whether, after arresting defendant on his doorstep, the officers' subsequent entry into his apartment to seize the contraband which they had earlier observed in plain view was proper. For the following reasons, we find that the police seized the contraband by securing defendant's apartment and placing it under surveillance. This seizure continued until defendant arrived.

Observation of narcotics in plain view does not constitute a search. Minnesota v. Dickerson, 508 U.S. 366, 375, 124 L. Ed. 2d 334, 345, 113 S. Ct. 2130, 2137 (1993). The officers' act of securing defendant's apartment in order to prevent the destruction or removal of the evidence was not an unreasonable seizure of either the dwelling or its contents. Segura v. United States, 468 U.S. 796, 806-13, 82 L. Ed. 2d 599, 609-14, 104 S.Ct. 3380, 3386-90 (1984). Defendant's possessory interest in the contraband was not violated by the seizure. Segura, 468 U.S. at 813, 82 L. Ed. 2d at 614, 104 S. Ct. at 3390. The officers' conduct here was the equivalent of a continuing seizure which gave them constructive possession

of the contraband. The police did not relinquish control of the apartment to defendant or any one else. Rather, they controlled access to the apartment by immediately setting up surveillance. After the contraband was seen in plain view, control of the apartment was never abandoned. When defendant returned, probable cause existed for his arrest based upon the neighbor's description and his apparent possessory interest in the apartment because he had a key to enter it.

Moreover, although three hours ultimately elapsed between the time the officers initially viewed the contraband and the time defendant arrived at the apartment, the officers had no way of knowing whether defendant would return in three hours or three minutes. Also, the police did not reenter the apartment to search it; rather, they went back to retrieve the drugs they had previously observed in plain view. A warrant is not required where a defendant is placed under arrest for possession of drugs the police have already seized. Whether the police waited for defendant inside the apartment or maintained surveillance from the outside is a distinction without a difference.

The case on which defendant relies, People v. Von Hatten, 52 Ill. App. 3d 338, 341-42 (1977), is distinguishable. In Von Hatten, the police arrested defendant for disorderly conduct, and a brief search was conducted incident to that arrest. Subsequent to defendant's arrest, his motel room was reentered and searched without a warrant. Evidence seized during the second search was unrelated to the crime for which defendant was arrested. Unlike the continuing seizure of evidence in plain view in the instance case, the police in Von Hatten conducted a thorough search when they

reentered defendant's room based upon their suspicion that they may have previously seen contraband.

Defendant also contends that the trial court improperly denied his challenge to the chain of custody evidence because of the different testimony regarding the weights of the contraband. Within this argument defendant also objects to McCurdy's explanation for the difference calling him a "surprise witness" whose testimony was in violation of Illinois Supreme Court Rule 412 and maintains that his testimony was not factually based. 134 Ill. 2d R. 412. Defendant requests a de novo review of the chain of custody issue, but ordinarily the trial court's ruling on the admissibility of evidence is reviewed on an abuse of discretion basis. People v. Harper, 279 Ill. App. 3d 801, 811-12 (1996).

The court in People v. Pavone, 241 Ill. App. 3d 1001, 1004 (1993), set forth the law regarding chain of custody evidence:

> "If an item cannot be readily identified or is susceptible to alteration by tampering or contamination, its chain of custody must render it improbable that the item has been contaminated, exchanged or subject to tampering. [Citation.] In establishing the chain of custody, the State is not required to exclude all possibility of tampering; it is sufficient to demonstrate that the exhibit has not been changed in any important respect and that it took reasonable protective measures since the substance was seized. [Citation.] Unless defendant provides actual evidence of

> tampering or substitution, the State need only establish a stated probability that tampering or substitution did not occur, and any deficiencies go to the weight and not the admissibility of evidence." Pavone, 241 Ill. App. 3d at 1004.

Here, Officer Kischner testified that he initially observed two large plastic rectangular Tupperware containers open on the floor of defendant's apartment. A green lid and a white lid lay nearby. Each container contained several clear plastic bags of a green plant-like substance. One of the large containers also held two taped kilo-packages and three clear plastic bags. Before submitting the suspected narcotics to the crime laboratory, Officer Kischner weighed 2,726 grams of the suspected cocaine and 13,287 grams of the suspected cannabis. At trial, the officer identified the container with the green lid, but the white lidded box was not offered. Officer Kischner testified that the cocaine was now open and cut, but he had only cut open the cocaine packaging "a little bit" to look inside.

At the laboratory, the officer and a laboratory employee counted 32 large plastic bags of marijuana and two large bricks of cocaine. The packages of marijuana were recovered from each of the two Tupperware containers. The cocaine was in the container with the green lid which was admitted into evidence at trial, sealed with tape as described by Officer Kischner.

Forensic expert Arthur Kruski testified that he received the sealed two Tupperware containers less than two weeks after the seizure. Kruski, who confirmed that the containers showed the same inventory number identified by

Officer Kischner, tested the 19 packages of cannabis, two bricks of cocaine, and three bags of cocaine in the green lidded container. In performing his analysis, Kruski testified that he repackaged the cannabis in a single large bag and the cocaine into four separate bags. He placed his identification marks, inventory number and his initials on each package before returning them to the green lidded box and sealing it. According to Kruski, the cannabis weighed 12,942.2 grams and the cocaine weighed 2,298.34 grams. Kruski further testified that the cannabis was divided equally between the two containers.

On May 11, 1998, two years after the seizure, Officer Kischner, defense counsel and an assistant State's Attorney removed the inventoried property from the evidence section. The green lidded container was sealed with Kruski's name on the tape. The items in the container were removed, photographed, replaced, and sealed with Officer Kischner's initials.

A month later, forensic expert Clifford McCurdy weighed and analyzed the contraband in the container with the green lid. He testified that the seals on the containers were broken and resealed with his initials. He identified the inventory number, a heat sealed plastic bag with plant material and four plastic bags containing a white powder. There was also another plastic bag which contained the packing from the drugs. McCurdy testified that he removed the cocaine from its packaging and crushed it before analysis. The cocaine weighed 2,294.9 grams and the cannabis weighed 6,405 grams.

Defense counsel then objected to the prosecutor's questions which called for McCurdy's explanation as to why his weights were less than Kruski's. Counsel argued that defendant had no notice that McCurdy would be called as a witness "to speculate on the difference in weight." Initially, the court found that defendant was entitled to notice before an expert made such a determination. The prosecutor countered that defendant had been given the telephone numbers of each chemist in order to ask why the amounts differed and also that an expert in the field of forensic chemistry did not need to speculate on the reason for the weight difference.

The court then ruled that defendant had not stipulated to the experts' divergent testimony regarding the weights of the contraband, but that defendant was not taken by surprise by the information. The court found that defendant's questions regarding the weight divergence could be handled in cross-examination. McCurdy was then examined as an expert and qualified. Defense counsel stated that he had already stipulated to McCurdy's credentials as an expert, but that his objection continued because McCurdy did not have "personal hands-on experience" regarding the handling of the contraband two years earlier.

McCurdy testified that the cocaine weighed less than it did during the initial testing first because a portion had been removed for testing, the solvents used during production of the drug evaporated over time, and the packaging contained some cocaine residue. How much weight was lost depended upon pressure, temperature, storage conditions, and humidity. McCurdy had weighed the cocaine before removing his sample for analysis. According to McCurdy, the loss of one percent in weight over time was not surprising or unusual.

McCurdy had seen losses of 15 to 20%, but his laboratory had no policy pertaining to what an unusual weight loss would be. The cocaine he tested was fairly dry.

Prior to closing argument, the trial court heard argument regarding the chain of evidence. The court first discarded Officer Kischner's weights because he weighed the contraband in its packaging. The court then considered the three gram difference between Kruski's weight and McCurdy's weight. The court found there was nothing to indicate tampering with the cocaine. It further found that the reason for the difference in the weight of the cannabis was the fact McCurdy had not weighed the cannabis in the white lidded container.

We first consider the difference in evidence regarding the weights of the contraband. The trial court did not abuse its discretion in discarding the weights provided by Officer Kischner who initially recovered and inventoried them. Officer Kischner had clearly weighed the cannabis and cocaine in their packaging, while Kruski and McCurdy had removed the packaging prior to weighing the contraband. The evidence also shows that McCurdy examined only items from the green lidded box, which Kruski stated contained roughly one-half the cannabis. This amount, 6,405 grams, is about one-half of the amount Kruski weighed, 12,942 grams. Since defendant presented no evidence of tampering other than the difference in weights, the chain of custody of the evidence was established and the trial court's admission of the evidence was proper.

Secondly, defendant claims that McCurdy's explanation regarding the difference in weights was a surprise

in violation of Illinois Supreme Court Rule 412 (134 Ill. 2d R. 412) and lacked scientific factual foundation. Whether an individual is qualified as an expert is a question of the trial court's discretion. People v. Miller, 173 Ill. 2d 167, 186 (1996). An individual may testify as an expert if his experience and qualifications afford him knowledge not common to laypersons and where such testimony will aid the trier of fact. People v. Burgess, 176 Ill. 2d 289, 309 (1997).

Here, defendant stipulated to McCurdy's expertise and challenged only McCurdy's personal knowledge of the handling of the contraband. In our view, the trial court did not abuse its discretion in permitting McCurdy to explain why cocaine would decrease in weight over a period of two years.

Defendant also contends that the State violated Illinois Supreme Court Rule 412 (134 Ill. 2d R. 412) by not tendering a copy of McCurdy's report explaining the decrease in the weights of the cocaine. Under Rule 412 (134 Ill. 2d R. 412), the State must disclose an expert's reports. People v. Glenn, 233 Ill. App. 3d 666, 686 (1992). However, the rule does not require the State to "disclose the fact that the expert has an opinion, only the expert's reports and statements. No authority exists to support defendant's assertion that the mere existence of an opinion, which is not embodied in a report or statement, must be disclosed." Glenn, 233 Ill. App. 3d at 686-87. As McCurdy's report did not contain McCurdy's opinion regarding the weight discrepancies, we reject defendant's contention that the State violated Rule 412 (134 Ill. 2d R. 412). Defendant does not cite any case which states that the mere existence of an opinion not embodied in a report or statement must be suppressed if it is not disclosed.

Defendant also maintains that McCurdy did not establish that his general explanations were based on accepted scientific principles as required under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); People v. Basler, 304 Ill. App. 3d 230, 233-34 (1999) (applying the Frye standard in Illinois). The Frye standard, however, applies to the admission of novel scientific evidence. Miller, 173 Ill. 2d at 187; People v. Eyler, 133 Ill. 2d 173, 211 (1989) . McCurdy's explanation for a loss in weight did not depend on a novel scientific procedure or technique. It depended on various factors known to contribute to loss of weight in controlled substances.

We also find no basis for defendant's claim that McCurdy's testimony should be rejected because it was not based on facts in evidence. The evidence showed that two years passed before McCurdy tested the substances, that some of the cocaine was stuck to the wrapping, and that cocaine is produced using solvents which evaporate over time. Accordingly, the trial court did not abuse its discretion in allowing McCurdy to give an explanation regarding the loss in weights and the narcotics were properly admitted.

Based on the foregoing, the judgment of the trial court is affirmed. As part of our judgment, we grant the State's request and assess defendant $100 as costs for this appeal.

Affirmed.

RAKOWSKI, J., with FROSSARD, P.J., and GALLAGHER, J., concurring.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

[Entered October 30, 2000]

No. 1-98-4322

THE PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee*,	)
v.	)
ANGEL GARCIA, *Defendant-Appellant*.	)

Appeal from the Circuit Court of Cook County,
Criminal Division.

No. 96 CR 19120

The Honorable Clayton J. Crane, Presiding.

ORDER

This cause coming to be heard on Defendant-Appellant Angel D. Garcia's Petition for Rehearing, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

/s/_____
JUSTICE

/s/_____
JUSTICE

/s/_____
JUSTICE

APPENDIX C

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

January 29, 2001

Mr. John P. Buckley
Ungaretti & Harris
3500 Three First National Plaza
Chicago, IL 60602

No. 90540 - People State of Illinois, respondent, v. Angel Garcia, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 20, 2001.